Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1298

WILLIAM BAIRD, DON R. JAFFE, M.D., PARENTS' AID SOCIETY, INC., SUSAN DOE, SUSAN DOE II, and SUSAN DOE III,

PETITIONERS,

v.

ALEXANDER E. SHARP II, AS HE IS THE COMMISSIONER OF THE DEPARTMENT OF PUBLIC WELFARE FOR THE COMMONWEALTH OF MASSACHUSETTS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, William Baird, Don R. Jaffe, M.D., Parents' Aid Society, Inc., Susan Doe, Susan Doe II, and Susan Doe III, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on January 15, 1979.

Opinion Below

The opinion of the Court of Appeals for the First Circuit has not yet been published in the official reports. A copy of the opinion is attached hereto as Appendix A. (App. 11).

Jurisdiction

The judgment sought to be reviewed was entered by the United States Court of Appeals for the First Circuit on January 15, 1979. No petition for rehearing by your Petitioners was filed because of the limitation of such petitions to new matters under Local Rule 15 of the First Circuit.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

Questions Presented for Review

1. Whether or not the Court of Appeals erred in deciding that abortion services which are deemed medically necessary by the woman's attending physician need not be funded under a state's plan.

2. Whether or not the Court of Appeals erred in deciding that the Hyde Amendment, Section 209, Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1977), acted so as to substantially modify the Medicaid Act, 42 U.S.C. §1396 *et seq.*

3. Whether or not the Court of Appeals erred in rewriting Chapter 367 §2 Item 4402-5000 of the Massachusetts Acts of 1978 to conform with the language of the Hyde Amendment, Section 209, Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1977).

Statutes and Regulations Involved

Chapter 367 §2, Item 4402-5000 of the Massachusetts Acts of 1978; Mass. Gen. Laws ch. 118E § 1; Section 209, Pub. L. 95-205 (Dec. 9, 1977); 42 U.S.C. 1396 *et seq.* and 42 C.F.R. 440.230 (1978) are involved. The pertinent texts of those sections is attached hereto as Appendix D. (App. 49).

Statement of the Case

The Commonwealth of Massachusetts participates in a federally sponsored program to provide medical assistance benefits to both welfare recipients and persons deemed to be medically needy. Mass. Gen. Laws Chapter 118E §1 *et seq.* Since the landmark decision by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), a nationwide controversy over federal and state funding of abortion procedures has erupted. Massachusetts has not escaped this controversy.

On December 7, 1977, Congress enacted the so-called Hyde Amendment, Section 209 of Pub. L. 95-205 (Dec. 9, 1977) to the H.E.W. appropriations bill. That amendment contained the following restrictions on funding for abortion services:

> "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." (Section 209 of Pub. L. 95-205).

On July 8, 1978, the Massachusetts legislature passed over a gubernatorial veto a budget item mandating that abortions would no longer be funded except "to prevent the death of the mother," or in instances of forced rape or incest. Before the passage of the budget for this fiscal year, Massachusetts provided reimbursement to physicians

and providers rendering abortion services to welfare recipients and the medically needy regardless of the reason for the abortion.

On July 12, 1978, Petitioners commenced suit in the United States District Court for the District of Massachusetts, alleging that the Massachusetts budget item violated the Federal Social Security Act and the Constitution.[1] Petitioners requested a preliminary injunction. On July 28, 1978, the District Court handed down its Order and Opinion in which the Court enjoined implementation of Chapter 367 "to the extent that it limits the scope of Medicaid-reimbursed abortions authorized by Section 209 of Public Law 95-205, 91 Stat. 1460, commonly known as the Hyde Amendment." Petitioners appealed. On August 7, 1978, after hearing, the United States Court of Appeals for the First Circuit expanded the injunction entered by the District Court so as to provide funding for abortions to indigent pregnant women for whom an abortion is deemed medically necessary. (App. 14).

At the request of all parties, the District Court ordered that the preliminary injunction be consolidated with the merits. The Petitioners duly appealed from the judgment. On January 15, 1979, the Court of Appeals entered the Judgment which is the subject of this Petition. By that Judgment, the Court of Appeals affirmed the District Court Order enjoining the implementation of the Statutes of 1978 Chapter 367 §2, Item 4402-5000, "insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amend-

[1] Subsequently, an additional and essentially similar action was filed by another set of plaintiffs. (*Preterm, Inc., et al.* v. *Michael S. Dukakis, et al.*). The *Preterm* case was heard and decided with the case of the Petitioners by the District Court. On appeal, both cases were again heard and decided together by the Court of Appeals (App. 11). Plaintiff-appellants in *Preterm* filed a Petition for Rehearing in the United States Court of Appeals for the First Circuit which was denied on February 2, 1979. (App. 48)

ment". (App. 36) The Court, while rendering a final judgment as to the statutory questions raised by the parties, made a further order that the case be remanded to the District Court for consideration of the constitutional questions and for a hearing regarding the standing of certain wrongfully dismissed plaintiffs. (App. 36-37).

Reasons for Granting the Writ

I. The Court of Appeals Erred in Deciding That Abortion Services Which Are Deemed Medically Necessary by the Woman's Attending Physician Need Not Be Funded Under a State's Plan.

In *Beal* v. *Doe*, 432 U.S. 438, 444-45 (1977), this Court suggested that ". . . serious statutory questions might be presented if a Medicaid plan excluded necessary medical treatment from its coverage . . ." In an earlier decision, this Court defined a necessary abortion as one which the woman's attending physician determines is needed "in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient." *Doe* v. *Bolton*, 410 U.S. 179, 192 (1973).

Although the Court of Appeals found that Chapter 367 violated the mandate of the Medicaid Act, it did not find that states were obligated to provide all medically necessary services. (App. 17-18) Petitioners contend that the interpretation of the Court of Appeals of the holdings in *Beal* and *Doe, supra,* is erroneous and should be corrected.

II. The Court of Appeals Erred in Deciding That the Hyde Amendment, Section 209, Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1977) Substantially Modified the Medicaid Act, 42 U.S.C. §1396 *et seq.*

The Court of Appeals found "that Chapter 367 fails to provide abortion services consistent with the requirements

of the Medicaid Act". (App. 21). It further found the "Medicaid Act, to the extent of its repugnancy with the Hyde Amendment, has therefore been altered by the Amendment". (App. 36). In so finding, the Court of Appeals sanctioned the repeal of substantive legislation, i.e., the Medicaid Act, by an appropriations measure, i.e., the Hyde Amendment. The Court of Appeals based its conclusion upon the legislative history, which to it, evidenced a clear message that Congress wanted to eliminate most abortion procedures from the Medicaid program.

Conceding, *arguendo,* that the Court of Appeals correctly assessed the Congressional intent, the Court of Appeals erred in ruling that in this instance an appropriations enactment could work a repeal of substantive legislation. In the case of *Tennessee Valley Authority* v. *Hill,* 98 S.Ct. 2279 (1978), this Court upheld the long-standing rule ". . . that repeals by implication are not favored" . . . and that this rule ". . . applies with full vigor when . . . the subsequent legislation is an appropriations measure." *Id.* at 2299.

Furthermore, the Court of Appeals concluded that were the expressions of Congress "held to be insufficient in quantity or quality to legislate substantially, we would in candor be forced to admit that legislation in appropriations acts was, as a practical matter, out of the question. Such a determination, regardless of our view of the wisdom of the course chosen by the legislature, is clearly beyond the proper scope of this Court." (App. 35)

Thus, the issue of whether or not in this instance an appropriations measure can work a very substantial modification of the Medicaid Act is ripe for adjudication by this Court.

III. The Court of Appeals Erred in Rewriting Chapter 367, §2, Item 4402-5000 of the Massachusetts Acts of 1978 To Conform With the Language of the Hyde Amendment, Section 209, Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1977).

The Court of Appeals enjoined "implementation of Stat. 1978, ch. 367, §2, Item 4402-5000 insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment" stating that, "[t]his result is in accord with the state's request that, should an injunction issue, it be modified to allow operation of Chapter 367 consistent with the requirements of the Medicaid Act." (App. 36). In doing so, the Court of Appeals substituted its opinion of how Chapter 367 should have been written in place of the Massachusetts' legislature's clear words, thus violating one of the leading canons of statutory construction.[2]

If the provisions of a statute are clear and without ambiguity, there is no need for the courts to examine the statutory history or legislative intent. *Arkansas Valley Industries, Inc.* v. *Freeman,* 415 F.2d 713, 717 (8th Cir.

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[2] The substitution of the Hyde Amendment language in Chapter 367 works the following changes: Chapter 367 provides funds in instances where the death of the mother would result if an abortion was not performed. The Hyde Amendment standard is more expansive in that funds are available where severe and long-lasting physical health damage to the mother would result if the abortion was not performed. Chapter 367 does not require that the need for an abortion be determined by two physicians as does the Hyde Amendment; Chapter 367 allows for performance of "medical procedures necessary for the prompt treatment of the victims of forced rape or incest if reported to a licensed hospital or law enforcement agency within thirty days after such incident", the Hyde Amendment for, "such medical procedures necessary for the victims of rape or incest" which have been reported promptly to a law enforcement agency or public health service. Thus, the Court of Appeals in essence struck out the adjective "forced" which modified rape, substituted "promptly" for "thirty days", deleted "licensed hospital" and substituted "public health service".

1969) ". . . [C]ourts are not free to rewrite legislative enactments to give effect to the judge's ideas of policy and fitness or the desirability of symmetry in statutes." *United States* v. *Shirah*, 253 F.2d 798, 800 (4th Cir. 1958).

Furthermore, there is no legislative history or statement of legislative intent accompanying Chapter 367. There was no indication that the General Court was not aware of the possible conflicts between Chapter 367 and Title XIX or the Hyde Amendment, nor was there any indication whatsoever that had the legislature become aware of these conflicts it would have chosen to remedy the conflicts in the same way as the Court of Appeals. The only suggestion of the legislative intent comes from an interview between one of the foremost proponents of Chapter 367, Representative Raymond Flynn and a local newspaper reporter. (Chapter 367 is popularly known as the "Doyle-Flynn Amendment") In that interview Mr. Flynn asserted that the District Court had erroneously concluded that the legislature intended to comply with the Hyde Amendment.[3]

[3] "According to Rep. Raymond Flynn of South Boston, cosponsor of the law, 'the decisions by Judge Caffrey and the Circuit Court were flagrant examples of the raw judicial power so prevalent in the federal court system.

'Here we have an incredible situation whereby the United States Supreme Court has said—as it did in 1977—that states do not have a constitutional obligation to use public funds for abortion.

'The legislatures—representing the people of 35 different states—have responded and enacted varying laws to protect the unborn where possible. The President of the United States and the Secretary of Health, Education and Welfare are strongly opposed to public financing of abortions.

'Yet the federal courts below the Supreme Court are taking it upon themselves to circumvent the authority and prerogatives of the legislatures and are becoming, in effect, super legislatures.

'The judges are going far beyond their jurisdictions when they feel empowered to write new law. They are exceeding their authority, not only by confining themselves to the interpretation of law, but by making new law.'

Rep. Flynn, who also is a member of the Boston City Council, criticized Judge Caffrey and Judges Hugh Bownes and Levin Campbell of the appellate court for their 'erroneous' versions of the 'intent' of the Massachusetts Legislature which overwhelmingly approved the restrictions on the use of taxpayers' funds for abortions.

'Our intent,' Flynn stressed, 'was crystal clear. And yet the federal jurists are now telling us what we intended when we passed the amendment to the budget. That's the height of presumption.

'I'd be willing to say that there isn't a person in the Massachusetts Legislature who doesn't have a thorough understanding of what he or she voted on and intended. There was no misunderstanding on our part and there was none by Gov. Dukakis who vetoed the measure but was overridden by both branches.' "

Boston, Globe, morning edition, August 17, 1978, p. 20 by David Farrell.

The only justification for a judicial rewriting of a statute is if it is necessary "to avoid absurdity or frustration of the meaning and purpose of the statute." *Arkansas Valley Industries, Inc.* v. *Freeman, supra,* at 718. That is clearly not the case here. Chapter 367 as written is clear; it intends to proscribe all state funding for abortion except in specific instances for the prevention of death, of forced rape, or of incest. The net effect of this rewriting is not to avoid frustration of the purpose of the statute. On the contrary, the changes frustrate the obvious legislative purpose behind Chapter 367. Such construction is beyond the scope of authority of a court, as defined in *Arkansas Valley, supra*, and such judicial rewriting ought not to be permitted to occur in this case.

IV. The Issues Raised by This Case Involve Substantial Federal Questions of Grave National Importance Which Have Not Yet Been Resolved by This Court.

As the Court of Appeals noted, "(a) number of lower courts have considered the compliance of state plans, similar to Massachusetts, with the Medicaid Act and have reached differing results." (App. 12 fn. 1). The Court then went on to discuss case by case the varying conclusions arrived at by courts having considered the issue, and con-

cluded that "... we believe that this court is the first court of appeals to reach the issues presented by this case."

The impact of the decision of the Court of Appeals will extend far further than the borders of Massachusetts.[4] The controversy over the public funding of abortions for poor women has been brewing on the federal level as well as in a majority of the states. The divergent conclusions regarding the interplay between state legislation, the Medicaid Act and the Hyde Amendment arrived at by the numerous courts and legislatures considering these issues demonstrates the need for clarification by this Court.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[4] The impact on Massachusetts women alone will be great. More than 6,000 abortions were provided by the Commonwealth of Massachusetts in the last year. The vast majority of those abortions were not performed solely to prevent severe and long-lasting physical health damage to the mother.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 78-1324

PRETERM, INC., et al.,
PLAINTIFFS, APPELLANTS,
v.
MICHAEL S. DUKAKIS, et al.,
DEFENDANTS, APPELLEES.

No. 78-1325

PARENT'S AID SOCIETY, INC., et al.,
PLAINTIFFS, APPELLANTS,
v.
ALEXANDER E. SHARP II,
DEFENDANT, APPELLANT.

No. 78-1326

PARENT'S AID SOCIETY, INC., et al.,
PLAINTIFFS, APPELLANTS,
v.
ALEXANDER E. SHARP II,
DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Nancy Gertner, with whom *Silverglate, Shapiro & Gertner*, *Barbara Sard*, and *John Reinstein*, were on brief, for Preterm, Inc., et al.

S. Stephen Rosenfeld, Assistant Attorney General, with whom *Francis X. Bellotti,* Attorney General, and *Garrick F. Cole,* Assistant Attorney General, were on brief, for Sharp, et al.

Joseph J. Balliro, with whom *Joan C. Schmidt,* was on brief, for Parent's Aid Society, Inc., et al.

Joseph J. Hurley and *Nutter, McClennen & Fish* on brief for William A. Lynch, M.D., et al., amici curiae.

January 15, 1979

COFFIN, *Chief Judge.* In this case we are called upon to assess the validity, in terms of compliance with the federal Medicaid Act, of Chapter 367, § 2, Item 4402-5000 of the Massachusetts Acts of 1978. Chapter 367 is an appropriations provision, limiting the expenditure of state funds for abortions to those abortions "which are necessary to prevent the death of the mother" and to those procedures "necessary for the proper treatment of the victims of forced rape or incest" if the incident is properly reported within thirty days.

At issue, as well, is the impact on the Medicaid Act and state plans thereunder of the Hyde Amendment, Section 209 of Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1977), first enacted as a rider to the FY 1977 Health, Education and Welfare appropriations bill. The Hyde Amendment for FY 1978 prohibits federal funding for abortions except "when the life of the mother would be endangered", when the woman is a "victim of rape or incest" and reports the incident "promptly" and in instances where "severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."[1]

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[1] A number of lower courts have considered the compliance of state plans, similar to that of Massachusetts, with the Medicaid Act and have reached differing results. *See, e.g., Emma G.* v. *Edwards,* Civ. No. 77-1342 (E.D. La. Nov. 27, 1978) (court issued preliminary injunction enjoining enforcement of statute which barred use of state funds for abortions "except when the abortion is medically necessary to prevent the death of the mother"); *Roe* v. *Casey,* Civ. Action No. 78-2214 (E.D. Pa. June 30, 1978) (district court issued temporary restraining order preventing state from refusing to reimburse providers for medically necessary abortions); *D. R.* v. *Mitchell,* Civ. No. 77-1056 (D. Utah June 20, 1978) (court granted state's motion for summary judgment and held that Medicaid Act does not require funding of all medically necessary abortions, but only those when the mother's life was endangered, relying in part on the Hyde Amendment's language); *Zbaraz* v. *Quern,* Civ. No. 77C 4522 (N.D. Ill. May 15, 1978) (on remand from the Seventh Circuit, 572 F.2d 582 (7th Cir. 1978) (district court enjoined state from denying reimbursement for therapeutic abortions and found that Hyde Amendment had no impact on the state's obligations); *Smith* v. *Ginsberg,* Civ. No. 75-0380 CH (S.D. W.Va. May 9, 1978) (district court enjoined enforcement of statute to extent it denied reimbursement for necessary therapeutic abortions, ordered parties to brief the Hyde Amendment issue).

In *Doe* v. *Kenley,* No. 78-1330 (4th Cir. Oct. 19, 1978), the Fourth Circuit considered the "limited" issue of whether a state which has established a policy for the stated objective of eliminating state medical assistance for *nontherapeutic abortions* may implement that policy by requiring a physician to certify that the woman's life would be endangered if the pregnancy was carried to term. It rejected the state's argument, adopted by the district court, that the words "endangerment of life" really meant "endangerment of health" and remanded the case directing that an order be entered clarifying the state's standard for funding abortions. The court further stated "that on the facts of this case we need not reach the statutory and constitutional issues raised by Doe of whether a state may be compelled by either Title XIX or the Constitution to fund induced therapeutic abortions." *Id.* slip op. at 12.

Thus, we believe that this court is the first court of appeals to reach the issues presented by this case.

The district court found that Chapter 367 violated specific provisions and the basic thrust of the Medicaid Act by failing to provide for abortions that were "medically necessary". However, because the court considered it "anomalous" to impose upon the state the obligation to fund "medically necessary" abortions for which the Hyde Amendment had prohibited federal funding, its preliminary injunction modified Chapter 367 to require state payment for at least those abortions funded under the Hyde Amendment. The court did not reach the constitutional arguments of the parties. *See Hagans* v. *Levine,* 415 U.S. 528 (1974).

Preterm, Inc., et al., plaintiffs below, then sought an expanded injunction pending appeal of the district court's preliminary injunction.[2] We granted that relief, and modified the district court's injunction to require the Commonwealth of Massachusetts to provide funding for abortions to "all Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service". Subsequently the district court ordered consolidation of the preliminary injunction with the merits and entered its preliminary injunction as a final order. All parties have appealed, and it is the district court's final order that is before us on review. We turn first to the question whether Chapter 367 violates the requirements of the Medicaid Act by providing for abortions, in circumstances other than pregnancy resulting from forced rape or incest, only when the abortion is "necessary to prevent the death of the mother".

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[2] The named plaintiffs in No. 78-1324 are Preterm, Inc., a non-profit corporation providing clinical services, including abortions, for indigent women; board-certified obstretricians and gynecologists practicing in Massachusetts; a Medicaid-eligible pregnant woman residing in Massachusetts; Massachusetts Welfare Recipients for Welfare Reform, an association of public assistance recipients; and Planned Parenthood League of Massachusetts, an unincorporated agency providing abortion counseling. In Nos. 78-1325 and 78-1326, the named plaintiffs, some of whom were dismissed below for lack of standing, *see infra*, are several Medicaid-eligible pregnant women; a Massachusetts physician and Medicaid provider; and an abortion counselor and director of Parents Aid Society, Inc., a non-profit Massachusetts corporation providing abortion counseling, which is also a plaintiff. The defendants in these cases are various officials of the Commonwealth of Massachusetts.

The district court also certified, pursuant to Fed. R. Civ. P. 23(c)(1), two classes of plaintiffs in the Preterm action: the first consisting of "all Medicaid-eligible pregnant women who desire to obtain an abortion and for whom a physician has determined that an abortion is a medically-necessary service but for whom an abortion is not necessary to prevent death", and second, "all physicians and other Medicaid providers . . . willing to perform abortions for women who fall within the first class."

I. *The Requirements of the Medicaid Act*

The Medicaid Act, Title XIX of the Social Security Act of 1965, operates to enable participating states, through the use of federal funds, to provide medical services to welfare recipients (the "categorically needy") and if the state chooses, to other needy recipients (the "medically needy"). *See Beal* v. *Doe,* 432 U.S. 438, 440 n. 1 (1977); 42 U.S.C. § 1396a(a)(10)(A), (C). Although a state's participation in Medicaid is voluntary, if it chooses to adopt a plan it must do so consonant with the requirements imposed by the Medicaid Act. *See Beal* v. *Doe, supra,* 432 U.S. at 441; *White* v. *Beal,* 555 F.2d 1146, 1149 (3d Cir. 1977); *Rush* v. *Parham,* 440 F. Supp. 383, 385 (N.D. Ga. 1977).

The plaintiffs below argue, and the district court found, that abortions, when "medically necessary" as determined by a physician are within the category of services which a state must provide. The state, on the other hand, contends that participating states are afforded great latitude in deciding which services will be furnished under their plans, and maintains that the Act nowhere requires a state to provide all "medically necessary" services. The disagreement between the parties is thus a fundamental one, and one which our study of the statute has not easily resolved.

Our analysis begins with the opening section of the Act, which both authorizes an appropriation and sets forth a general statement of purpose:

> "*42 U.S.C. § 1396. Appropriation*
>
> For the purpose of enabling each State, *as far as practicable* under the conditions of such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled *individuals, whose income and resources are insufficient to meet the costs of necessary medical services,* and (2) rehabilitation . . . , there is hereby authorized to be appropriated . . . ." (emphasis added).

The district court and other courts which have found a requirement within the Medicaid Act that states provide all "medically necessary" services have relied heavily on this section. *See, e.g., Rush* v. *Parham, supra,* 440 F. Supp. at 389. It does not seem, however, that the words "necessary medical services" are properly read as a substantive requirement imposed on the states. Instead, this section merely specifies for whose benefit federal funds are to be appropriated—those "individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396. *See also* 42 U.S.C. § 1396a (a)(10)(C). Furthermore, the section apparently contemplates some flexibility in the Act's demands on each state, stating that its purpose is to enable a state to furnish medical assistance "as far as practicable under the conditions of such State."

Our view finds support from the structural composition of the Act. Section 1396a is the provision which details the required contents of a state plan for medical assistance. Among the 37 items listed, we find no mandate that all "medically necessary" services be provided. We therefore hesitate to draw the words "necessary medical services" from their context—an appropriations section—and in effect transport them into a contents section requirement.

Although we are unable to discover a statutory requirement that states provide medically necessary services, we do find guidance within the statute, albeit less explicit, for deciding this case. Section 1396a requires that a state plan for medical assistance provide five general categories of medical services to the categorically needy, enumerated in § 1396d(a): (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facilities, screening and treatment for persons under the age of 21 and family planning services

and supplies, and (5) physicians' services.[3] In *Beal* v. *Doe, supra,* 432 U.S. 438, the Supreme Court, deciding whether a state plan which denied funds for abortions unless they were certified by a physician as "medically necessary" was violative of the Medicaid Act, stated that: "Title XIX [Medicaid] does not require states to provide funding for all medical treatment falling within the five general categories". But, "it does require that state Medicaid plans establish 'reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].' 42 U.S.C. § 1396a(a)(17) (1970 ed., Supp. V)." *Id.* at 440-41. The Court further emphasized that the Act "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives of the Act.' ", *id.* at 444, and concluded that the state's "refusal to extend Medicaid coverage to nontherapeutic abortions is not inconsistent with Title XIX." *Id.* at 447.

The Court's opinion contains a dictum relied on by the district court: "*[a]lthough serious statutory questions might be presented if a Medicaid plan excluded necessary medical treatment from its coverage,* it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services." *Id.* at 444-45 (emphasis added to introductory clause). This language is indeed relevant to the issue at hand—the validity of a state plan which allows payment for abortion services in other than cases of rape or incest only when "necessary to prevent the death of the mother"; but we do not believe that we should read this dictum as signalling a flat rule that all services within the five general

[3] States are given a greater choice in determining the types of services that it provides to the "medically needy". 42 U.S.C. § 1396a(a)(13)(C).

categories deemed "medically necessary" by a patient's physician must be provided by the state plan.

Such a reading, permitting the most varied content to the words "necessary medical services", the variations being theoretically limited only by the diversity of physicians, would seem at war with the goals of consistency and fairness in the administration of the statute. We see two levels of judgment as to medical necessity in the statutory scheme. The first is the macro-decision by the legislature that only certain kinds of medical assistance are deemed sufficiently necessary to come under the coverage of its plan. The second is the micro-decision of the physician, that the condition of his patient warrants the administering of a type of medical assistance which that plan makes available. Our task here is to test the judgment of the Massachusetts legislature as to medical necessity, i.e., was its decision to limit state funded abortions, in other than cases of rape or incest, to those necessary to save the life of the woman "reasonable" and "consistent with the objectives of [Title XIX]"? 432 U.S. at 441, 444; *see* 42 U.S.C. § 1396a(a)(17).

The regulations promulgated by the Department of Health, Education and Welfare pursuant to the Medicaid Act and having the force of law, detail the permissible and impermissible ways in which a state may exclude or diminish payment for certain services in its plan. 42 C.F.R. § 440.230 (1978) provides that:

> "(a) The plan must specify the amount and duration of each service that it provides.
>
> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
>
> (c) (1) The medicaid agency may not deny or reduce the amount, duration, or scope of a required service under §§ 440.210 [for the categorically needy] and 440.220 [for the medically needy] to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
>
> (2) The agency may place appropriate limits on a service based on medical necessity or on utilization control procedures.

The plaintiffs below maintain that the limitations imposed by Massachusetts on abortion services render those services insufficient in "amount, duration and scope" to reasonably achieve their purpose, and that the limitations are based solely on the type of medical condition involved rather than on determinations of medical necessity.

In *White* v. *Beal*, 555 F.2d 1146 (3d Cir. 1977), the Third Circuit construed this regulation in determining whether a state plan, which made eyeglasses available to persons who needed them because of eye pathology but denied them to persons suffering from other types of visual impairment, violated the Medicaid Act. The court held that the plan was violative of the Act because it distributed the service in a manner which did not bear a rational relationship to the "underlying federal purpose of providing the services to those in greatest need of it", *id.* at 1151. Citing 45 C.F.R. § 249.10(a)(5)(i), the earlier codification of the regulation, it stated that "[t]he regulations permit discrimination in benefits based upon the degree of medical necessity but not upon the medical disorder from which the person suffers." *Id.* at 1151-52.

We think that the limitations imposed by Chapter 367 on abortion services similarly violate the purposes of the Act and discriminate in a proscribed fashion, although perhaps less obviously than did the plan in *White* v. *Beal*, *supra*. It could perhaps be argued that the Massachusetts plan reserves abortion services to those in greatest need —women who will die without an abortion—and denies it to those who need it less—women who will suffer damage to their health, no matter how grievous, but who will sur-

vive without the abortion. But we do not believe that the Medicaid Act contemplates or sanctions anything so stark. When a state singles out one particular medical condition —here, a medically complicated pregnancy—and restricts treatment for that condition to life and death situations it has, we believe, crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition.

The Medicaid system was established for the purpose of enabling a state, with federal participation, to provide medical assistance to eligible individuals in need of treatment and unable to pay for it. *See* 42 U.S.C. § 1396. We find it "unreasonable" and wholly "[in]consistent with the objectives of the Act", 42 U.S.C. § 1396a(a)(17), for a state to provide abortion services and then, with limited exceptions for victims of rape and incest, deny it to all those who will not die without it. We know of no other instance where a legislative decision to pay for medical care is based on the distinction between life and death. If only those suffering at death's door from sickle cell anemia or syphilis could receive publicly provided medical care, but not those condemned to a lifetime of dependency, one would be hard put to discern any rational social objective being thereby served. So we think here.[4] In addition, Chapter 367 is inconsistent with the Act, which provides for a central role for the physician in determining proper treatment, by circumscribing his professional judgment so drastically. As a physician's affidavit submitted on behalf of the plaintiffs below attests "[a] standard of medical necessity which considers only the certainty or likelihood

[4] The limitations in the Massachusetts Act clearly cannot be justified as a cost-saving mechanism. *See White* v. *Beal*, 555 F.2d 1146, 1150 (3d Cir. 1977). It is uncontroverted that the costs of medical treatment necessary when even healthy pregnancies are carried to full term exceed the costs of therapeutic—or even elective—abortions. *See Maher* v. *Roe*, 432 U.S. 464, 478-79 (1977).

of a patient's death is alien and antithetical to medicine in general. I know of no area of medical practice in which a physician exercises professional responsibility solely in terms of life and death assessments."

Accordingly, we conclude that Chapter 367 fails to provide abortion services consistent with the requirements of the Medicaid Act. We now turn to the question of the impact of the Hyde Amendment on state plans adopted pursuant to that Act.

II. *The Impact of the Hyde Amendment*

The Hyde Amendment, the name given to language inserted into the FY 1977 and 1978 Health, Education and Welfare appropriations bills, in its current form prohibits use of appropriated federal funds for Medicaid abortions except in specified situations.[5] The first two are similar to those in Chapter 367—instances where "the life of the mother would be endangered" and when she is the victim of rape or incest and reports the incident promptly. The Hyde Amendment differs from the Massachusetts Act, however, by providing a third exception—"where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."[6]

[5] Congress, in the final days of the Second Session of the 95th Congress, reenacted the identical language in its FY 1979 HEW appropriations bill.

[6] Several district courts have commented on the impact of earlier versions of the Hyde Amendment on the Medicaid Act. In *McRae* v. *Mathews*, 421 F. Supp. 533, 538 (E.D. N.Y. 1976), the court found that:

> "The manifest fact is that [the Hyde Amendment] is calculated to stop the provision of abortional services from public funds; it is not calculated to shift the burden of providing this medical assistance to the states."

Finding probable success on the merits in light of cases which found plans eliminating elective abortions invalid, the court enjoined the Secretary of Health, Education and Welfare from deny-

Plaintiffs contend that the Hyde Amendment must be construed according to its literal terms as authorizing federal funds for certain limited categories of abortions and thus shifting the total cost to the states of providing those abortion services not funded by the Hyde Amendment but nonetheless required by the Medicaid Act. They maintain that the Hyde Amendment has no impact on a state's obligations to provide services required by the Act.

The state, on the other hand, argues that even if this court should find, as it has, that Chapter 367 contravenes the Medicaid Act by providing abortions in cases other than rape or incest only when necessary to prevent the woman's death, the Hyde Amendment constitutes a congressional statement that the states need not fund more abortions than Congress is willing to fund, although they could choose to do so if they wished. The Hyde Amendment, according to the state, is to be viewed as a policy decision concerning a state's obligations to provide publicly funded abortions and not as merely a shifting of the costs of non-Hyde Amendment abortions to the states. In support of its position, the state points to the congressional debates which preceded passage of the Amendment as well as the basic structure of the Act, namely joint federal and state participation in providing medical assistance to the needy. Apparently relying on this latter factor, the district court found that it would be "anomalous" to require states to pay for abortions for which the Hyde Amendment had withdrawn federal funds and enjoined the state from refusing to provide abortions for which Hyde Amendment funds were available. By so ruling, the court implicitly concluded that the Hyde Amendment should be read as having a substantive effect on the state's obligations under the Medicaid Act and not merely as a shifting of the responsibility to pay for abortions.

ing Medicaid reimbursement for elective abortions. The case was vacated and remanded on appeal for further consideration in light of *Maher* v. *Roe*, 432 U.S. 464 (1977) and *Beal* v. *Doe*, 432 U.S. 438 (1977). *See Califano* v. *McRae*, 433 U.S. 916 (1977); 434 U.S. 1301 (1977).

In contrast, in *Doe* v. *Mathews*, 420 F. Supp. 865, 869 (D. N.J. 1976), the court refused to issue a temporary restraining order preventing the Secretary from enforcing the Hyde Amendment, in part, because:

> "[Title XIX] was not amended or affected by the Hyde Amendment. Title XIX remains in force as it stood when *Beal* and *Klein* was decided. The Hyde Amendment affects the federal appropriation to HEW for fiscal 1977, and its application is limited to the treatment of items of cost incurred by a Medicaid State for which federal funds can be paid to that State. It has no application to the kinds of items for which a State must pay if it has enacted a Medicaid Law."

See Doe v. *Mathews*, 422 F. Supp. 141 (D. D.C. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (court found that plaintiffs had no standing to sue the Secretary in a Hyde Amendment challenge, not having demonstrated that state officials would, or could pursuant to Title XIX or the Constitution, deny reimbursement for abortions other than those provided for in the Hyde Amendment).

Our inquiry begins with the words of the statute itself, which if clear, ordinarily obviate the need to resort to extrinsic aids of statutory construction. *See Tennessee Valley Authority* v. *Hill*, 98 S.Ct. 2279, 2296 n. 29 (1978); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); *Massachusetts Financial Services, Inc.* v. *Securities Investor Protection*, 545 F.2d 754, 756 (1st Cir. 1976). The language of the Hyde Amendment, on its face, supports the plaintiffs' position. The Amendment states that "none of the funds provided for in this paragraph shall be used" to perform abortions, unless they fall within specified categories, and thus reads as a mere withdrawal of federal funds for certain services. No mention is made in the provision of any impact on the state's obligations. However, when the plain meaning of a statute produces a result "plainly at variance with the policy of the legislation as a whole" and "aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on

'superficial examination.' " *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-44 (1939); *Massachusetts Financial Services, Inc.* v. *Securities Investor Protection, supra*, 545 F.2d at 756. The construction urged by the plaintiffs would result in imposing an obligation on the states to fund the total cost of non-Hyde Amendment therapeutic abortions, a result not consonant with the basic policy of the Medicaid system under which the federal government participates in the funding of medical services provided by the states. *See* 42 U.S.C. § 1396; *Doe* v. *Beal, supra*, 432 U.S. at 440; *White* v. *Beal, supra*, 555 F.2d at 1149. We therefore think it necessary to consider the legislative history of the Hyde Amendment.

The Legislative History

Congressional consideration of the Hyde Amendment began in the House of Representatives on June 17, 1977 and ended with a Senate debate and vote on a compromise measure on December 7, 1977. During this six month period some ten different versions were passed in one of the chambers, *see* CCH Medicare-Medicaid Reporter ¶ 28,832, at 9151, and no fewer than 25 roll call votes had been taken in the House and Senate. Congressional Quarterly, Weekly Report, Vol. XXXVI No. 5 at 258 (Feb. 4, 1978). There are neither conference reports nor committee reports; all we have are the debates and insertions in the Congressional Record. These, however, if considered as a whole, are illuminating. The leaders of both sides in the debate spoke often and long enough and clearly enough so that there is no doubt about what the Congress wanted to do and thought it was doing.

To begin with, there are a few observations to the effect that all that the Amendment is concerned with is the expenditure of federal dollars. For example, on the first day of debate in the House, Congressman Doran said, "It

simply denies Federal funds for the realization of a personal . . . decision . . . ." 123 Cong. Rec. H. 6086 (June 17, 1977). Similarly, Congressman Edwards observed that "the only thing over which we have any control is what we do with Federal dollars." *Id.* at 6090. Much later, Congressmen Hyde and Flood made statements to the effect that the issue at hand concerned the use of federal funds for abortion. 123 Cong. Rec. H. 10826-30 (Oct. 12, 1977). *See* 123 Cong. Rec. S. 11039 (June 29, 1977) (Senators Bellmon and Stennis). Not only are these the only such comments in the entire debate which the briefs of the parties and our own research have unearthed, but even they are consistent with the conclusion that the Congress utilized the device of withholding federal funds as the means of making a substantive change in the law.

Moreover, the record is clear that both houses of Congress were acutely conscious that they were engaging in substantive legislation. The very first event which took place in the House of Representatives was the making of two points of order, the sustaining of the same, and an amendment by sponsor Hyde simply confining his Amendment to a ban on spending federal funds for abortions, any abortions. Congressman Hyde then expressed his regret that the points of order forced him to exclude mother's-life-saving therapeutic abortions from his Amendment, adding that he agreed with those who had said it was unfortunate to burden appropriation bills with complex issues such as busing and abortion but that "The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill." 123 Cong. Rec. H. 6083 (June 17, 1977). Subsequently, on August 2, after a candid explanation by

Congressman Flood that the only way to enable the Amendment to exclude from its proscriptions abortions in cases of life endangering pregnancies was to restore the original language, such language was restored and no further points of order were made. 123 Cong. Rec. H. 8348-49 (Aug. 2, 1977).

In the Senate a point of order was made and the Senate, by voting that a Senate version of the Amendment was germane to the subject matter of the House bill, thus satisfying Senate Rule XVI, legitimized its subsequent legislating. 123 Cong. Rec. S. 11055 (June 29, 1977). Before the vote was taken, Senator Brooke lodged this protest:

> "Mr. President, I urge the Senate to support the amendment striking all restrictions on the use of medicaid funds for the performance of abortions. Such restrictions are a blatant case of legislating on an appropriations bill, a most unwise practice and one which I adamantly oppose regardless of the subject." *Id.* at S. 11035.[7]

At the very end of the process Senator Magnuson, a proponent of fewer restrictions, expressed his unhappiness, saying pithily, "I have said many, many times, as sort of a voice in the wilderness, that this does not belong on the HEW bill. It is legislation of the rawest nature on an appropriations—money—bill." 123 Cong. Rec. S. 19440

[7] Senator Brooke continued, voicing other objections to the proposed Amendment:

> "However, I oppose restrictions on medicaid abortions for other equally valid reasons. First, the Senate should not through a funding decision in effect deprive our most vulnerable and helpless citizens, the poor, of an established constitutional right. Second, the Senate should not so thoughtlessly try to impose simplistic solutions on so complex an issue. And third, the Senate should not legislate in a medical area in which we have absolutely no competence and dictate medical decisions which a physician and a physician alone is trained and capable to make." 123 Cong. Rec. S. 11035 (June 29, 1977).

Dec. 7, 1977). And Senator Stennis, a supporter of greater restrictions on abortions, complained about the Senate's "obscure rules about amendments on appropriations bills, that contain legislation on appropriations bills", and noted that a "lot of this type of proposals [*sic*] are in this bill, including the point on abortion." *Id.* at S. 19445. Senator Brooke devoted much of his effort in this part of the debate to making clear "the legislative intent of the provisions we are acting upon . . . . Since [HEW has] not given us any interpretation, I think we should clarify for them what the legislative intent is." *Id.* at S. 19441. Senator Javits called the end result of this six month effort "a milestone in our legislation". *Id.* at S. 19443.

Moreover, the inclusion of very specific and detailed provisions underscored the substantive nature of the legislation being enacted. *See, e.g.,* the comments of Congressman Michel in explaining how the House of Representatives had rejected the inclusion of danger to mental health as a reason for funding abortions, 123 Cong. Rec. H. 12651, 12656 (Dec. 6, 1977); Senator Brooke's and Senator Javits' doubts of the constitutionality of the requirement of a certificate from two physicians that severe and long-lasting physical health damage would occur, 123 Cong. Rec. S. 19440-19443 (Dec. 7, 1977); and Congressman Michel's attempts to define what was meant by the prompt reporting requirement in cases of rape and incest, 123 Cong. Rec. H. 12652-12653 (Dec. 6, 1977).

Perhaps the message of the legislation was conveyed most clearly by those who were opposed to restrictions on publicly funded abortions. Their litany of opposition stressed the harshness of depriving the poor of abortions which the more affluent could afford. The universal assumption in debate was that if the Amendment passed there would be no requirement that states carry on the service. Congressman Stokes referred to the Amendment as "tanta-

mount to a constitutional amendment outlawing abortions for the poor." 123 Cong. Rec. H. 6085 (June 17, 1977). Congressman Holtzman said that it "condemns to death poor women, who, if they give birth, will die . . . ." *Id.* at H. 6092. Others spoke to the same point, *see, e.g., id.* at H. 6097 (Congressman Meyner), 123 Cong. Rec. at H. 10968 (Congressman Sears), *id.* at H. 12656 (Congressman Fraser).

The predictions were no less dismal in the Senate. Senator Packwood said: "Let us be very clear about it. If we do not fund abortions, these 250,000 to 300,000 women who now receive abortions, paid for by Federal or State moneys under medicaid, are either going to have babies they do not want or are going to go to backroom abortionists. There is no question that the poor are going to be discriminated against." 123 Cong. Rec. at S. 11031 (June 29, 1977). Similar remarks were made by Senator McGovern, *id.* at S. 11040; Senator Bayh, *id.* at S. 11043; Senator Brooke, 123 Cong. Rec. at S. 13672 (Aug. 4, 1977); and Senator Javits, 123 Cong. Rec. at S. 19443 (Dec. 7, 1977).

Another variant of the message was that, if the Amendment were passed, the states would have the option to provide abortion on more liberal terms than those contained in the Amendment, but only if they wished to do so. Congressman Russo, a supporter of the Amendment, after expressing satisfaction over the prospect of "saving" 240,000 more lives if the source of funds were eliminated, said, "of course, eliminating Federal funds would not end all Government financing of all abortions. States would retain the option of providing money to poor women for abortions if they want. But the Federal Government's example would encourage States participating in the medicaid program to discontinue this aspect of medical care to the poor—an option States cannot exercise at the present

time." 123 Cong. Rec. H. 6097-6098 (June 17, 1977). Other spokesmen to the same effect were Senator Helms, 123 Cong. Rec. S. 18584-18585 (Nov. 3, 1977); Congressman Early, 123 Cong. Rec. at H. 10835 (Oct. 12, 1977); and Congressman Smith, 123 Cong. Rec. at H. 12653 (Dec. 6, 1977).

Finally, the total absence in the debate of any suggestion that massive financial burdens were being shifted to the states further belies plaintiffs' contention that states were to continue to fund abortions beyond those qualifying under the Hyde Amendment. Indeed, were a state to undertake to pick up the burden dropped by the federal government and divert funds from other medical services, the functioning of its entire plan would be crippled.

From this sampling—which we think is a fair representation of the entire Congressional debate—we are persuaded that Congress realized that it was using the unusual and frowned upon device of legislating via an appropriations measure to accomplish a substantive result. That result was, it believed, far more significant than the proscription of federal funding of a program mandated by Medicaid to continue even if only with state funding.

Repeal by Implication

Plaintiffs contend that this reading of the Hyde Amendment brings it into conflict with the Medicaid Act and thus violates both the principle that we should endeavor so to construe two statutes that they may be capable of coexistence, "absent a clearly expressed congressional intention to the contrary", *Morton* v. *Mancari,* 417 U.S. 535, 551 (1974), and the equally prominent principle disfavoring repeals by implication, especially repeals via appropriations measures, *Tennessee Valley Authority* v. *Hill,* 98 S. Ct. 2270, 2299-2300 (1978).

As a preliminary matter, we agree that our construction of the Amendment, as a substantive enactment of a state's

Medicaid obligations, produces a conflict with the Medicaid Act. We have held that the Medicaid Act requires an inquiry into whether a state plan which limits reimbursement for certain services, does so in a way that is "reasonable", "consistent with the objectives of the Act", 42 U.S.C. § 1396a(a) (17) and without discriminating solely on the basis of the particular "diagnosis, illness or condition", 42 C.F.R. § 440.230 (1978), and we do not believe that a state plan, funding only those abortions specified in the Hyde Amendment, would be consistent with these requirements of the Act.[8] The Hyde Amendment does not suffer from the defect of the Massachusetts Act by limiting the availability of funds, except in cases of rape and incest, to life and death situations. Such a discrimination, we determined, could not reasonably be said to be one based on medical need. *See White* v. *Beal, supra,* 555 F.2d at 1151-52. Nor does the Hyde Amendment reduce the role of the physician to making professional judgments based solely on prevention of the woman's death, as does the Massachusetts Act. We think it important, in terms of its consistency with the Act, that the Hyde Amendment permits funding for abortions needed to prevent "serious and long-lasting physical health damage", a standard that allows a physician's consideration of health needs, short of life and death. The requirements that the damage be "severe" and "long-lasting" apparently are designed to ensure that funds will in fact be reserved to those who most need the treatment.

Thus far, we might feel that we should conclude that

[8] Had we concluded, as did the district court, that the Medicaid Act required a state to provide all "medically necessary" services as determined by a physician, the conflict between the Amendment and Medicaid would be readily apparent and far ranging. The narrow categories funded by the Hyde Amendment would certainly not encompass all situations in which a physician, exercising his professional judgment, could certify that an abortion was medically necessary.

the Hyde Amendment, if intended as a substantive statement on a state's obligations, was in no way repugnant with the Medicaid Act's requirements for state plans. However, we are troubled by the Amendment's requirement that the damage be to *physical* health, impliedly excluding abortions needed to prevent severe and long-lasting *mental* health damage. This distinction, if embodied in a state plan, would seem to contravene the Medicaid Act's mandate that a state may not "deny . . . a required service . . . solely because of the diagnosis, type of illness or condition." 42 C.F.R. § 440.230 (1978). Such a discrimination carried to the point of total denial of abortion services when serious injury to a person's mental health if the pregnancy is carried to term is diagnosed, cannot, we believe, be considered to be based on medical need. *Id.* The discrimination sets up a presumption that physical health damage is always more serious and hence more important to prevent than mental health damage, a presumption that is nothing less than absurd.[9] It follows, without further

[9] In *Graves* v. *Fisher,* 361 F. Supp. 1356 (D. Me. 1972), *aff'd,* 412 U.S. 924 (1973), a three-judge court, including members of this court, construed requirements imposed on the states by Title XVI of the Social Security Act analogous to those of Title XIX, the Medicaid Act. It held that Maine had violated the Social Security Act and regulations thereunder by excluding a "category of applicants for disability assistance on the basis of the source of the diagnosed impairment", *id.* at 1359, in particular, persons "suffering solely from psychoneurotic disorders, regardless of severity or permanence". *Id.* at 1357. Although the state in that case had imposed limits on *eligibility* for medical assistance, and we are concerned with attempts by a state to restrict the medical assistance that it provides to eligible recipients, the court's reasoning is equally pertinent here:

> "If an applicant can prove that his disability is the functional equivalent of that of other persons receiving assistance, the source of or medical definition of his disability should be irrelevant. . . . [T]he reference in 42 U.S.C. § 1382 (a)(13) to 'reasonable standards . . . for determining eligibility, cannot be construed as a license to states to introduce eligibility conditions which relate neither to the duration nor to the degree of an applicant's impairment." *Id.* at 1359.

See Boisvert v. *Zeiller,* 334 F. Supp. 403 (D. N.H. 1971).

elaboration, that we could not describe it as "reasonable" or "consistent with the objectives of the Act" to withhold treatment in this fashion. 42 U.S.C. § 1396a(a)(17).[10]

Contrary to plaintiffs' assertions, this conclusion does not compel us to embrace their reading of the Amendment as a mere withdrawal of federal monies. Although that reading may permit the Hyde Amendment and the Medicaid Act to co-exist facially by effecting no change in the Act's requirements for state plans, it requires us to do violence to the Medicaid Act on a more pervasive and fundamental level than would result from reading the Amendment as a substantive alteration of those requirements. The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to drop the total cost of providing the service upon the states, runs directly counter to the basic structure of the

[10] Whether the legislators realized that they had come into conflict with the Medicaid Act's requirements by so legislating, or believed that the Hyde Amendment, although legislative in impact, was consonant with the Act, we cannot say with certainty. At one point in the debate, several members appeared to suggest that their particular versions of the Amendment were consonant with the Act's requirements. *See* 123 Cong. Rec. S. 11048, 11051 (Senators Schweiker and Brooke). For example, Senator Brooke, arguing for payment for all abortions deemed medically necessary by a physician, stated that "['Medically necessary'] are words of art that are used throughout medical legislation. They are used for all social security funds and for all medical funds." *Id.* at S. 11051. Perhaps we could infer an intent to repeal portions of the Medicaid Act from the fact that the Congress enacted a far more restrictive bill than one which, at least according to Senator Brooke, would be consistent with the Act. We do not believe, however, that we need find express statements in the debates that the Amendment would conflict with the Act; it is enough that the natural result of the clearly expressed intent to legislate was to create a "positive repugnancy" between its restrictions and provisions of the Medicaid Act. Such a repugnancy itself suggests the intent to repeal. *See Morton* v. *Mancari*, 417 U.S. 535, 550 (1974); *United States* v. *Borden Co.*, 308 U.S. 188, 198-99 (1939); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936).

program[11] and could seriously cripple a state's attempts to provide other necessary medical services embraced by its plan.

Moreover, the principle that two statutes should if possible be found capable of co-existence does not suggest that we should approach the statute with blinders and reconcile them at all costs, even when the second enactment is an appropriations measure. *Tennessee Valley Authority* v. *Hill, supra,* which plaintiffs have so vigorously invoked as indicating that either express or implied repeal of Medicaid is unthinkable, is not authority to the contrary. Indeed, our analysis of the factors which distinguish that case from the one at bar indicates that our construction of Congressional intent is proper. *Tennessee Valley Authority* v. *Hill, supra,* involved an unsuccessful argument that the continued appropriating of funds for the Tellico Dam repealed by implication the Endangered Species Act insofar as that Act would otherwise have required construction of the dam to be held up because of the fact that the snail darter and its habitat would be placed in jeopardy. The elements in that case were (1) brief statements of opinion of committee members in a lengthy report, that (2) monies in a very large appropriation act should be used to complete a dam, (3) although the act itself did not identify the approved objects of expenditure, and (4) the act supposedly repealed pro tanto lay in the jurisdiction of another committee. The Court had no difficulty

[11] In *McRae* v. *Mathews*, 421 F. Supp. 533, 538 (E.D. N.Y. 1976) (vacated and remanded on other grounds), *see* note 6 *supra*, Judge Dooling rejected the argument that the Hyde Amendment, for FY 1977, had not altered a state's obligations to fund abortions required by the Medicaid Act because:

> "The argument overlooks the essential nature of the Medicaid legislation. The state and federal governments are linked in a fiscal partnership to provide for medical assistance to the needy; the program is based on the federal initiative, and the funding is primarily federal (42 U.S.C. §§ 1396, 1396d(b))."

in observing that since legislators are entitled to assume that appropriated funds are to be "devoted to purposes which are lawful", 98 S. Ct. at 2300, there was no basis to suppose that they felt any conflict between funding the dam and the Endangered Species Act. It also noted that there was "no indication that Congress as a whole was aware of [the committees'] views", *id.*, that "the appropriations committees had no jurisdiction over the subject matter of endangered species", *id.*, and that the "appropriations Acts did not themselves identify the projects for which the sums had been appropriated." *Id.* at 2299 n. 35.

Here, in contrast, the objective was a solitary, specific proscription, not a hidden permitted purpose among a multitude; and the appropriation related completely to the subject matter of the affected substantive legislation. In *United States* v. *Dickerson,* 310 U.S. 554 (1940), the Court faced a situation more apposite to that at bar. Congress had enacted a proviso, appended to an appropriations bill, that none of the funds appropriated therein were to be used for payment "of any enlistment allowance for 're-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10' of the Act of June 10, 1922." *Id.* at 555. The Court concluded that Congress had intended to suspend the enlistment allowance authorized by § 9 and not merely to restrict the use of federal funds for that purpose. *Id.* at 561. It refused to limit its analysis to the "plain and unambiguous" language of that statute and turned to the legislative history which clearly showed Congressional intent to legislate by an appropriations bill. *Id.* at 559-62.

Furthermore, the legislative history which we have turned to in resolving this case does not suffer from the defects noted by the *Tennessee Valley Authority* v. *Hill* Court. The statement of Congressional intent upon which we rely is not embodied in appropriations committee re-

ports, which represent merely the views of its members and may never have come to the attention of Congress as a whole. The heated and lengthy debates that led to passage of the numerous versions of the Hyde Amendment took place on the floor of each house, and the views expressed were those of a wide spectrum of its members.

We recognize the force of our brother's dissent, that a court should not infer lightly that Congress has legislated in an appropriations measure so as to repeal a prior enactment, a legislative process that contravenes its rules, and that Congress has not, in so many words, stated that the Hyde Amendment repeals portions of the Medicaid Act. But we are unable to view this six month intensive debate —albeit an emotional one—as a mere exercise in cost-shifting. To so conclude ignores statement after statement by proponents and opponents of the Amendment that its passage would allow states to choose whether to fund more abortions than those specified therein and that it would affect drastically the lives of poor women by closing off their access to these services. Such a conclusion ignores as well the unquestionably explicit awareness by the legislators that they were using the disfavored vehicle of an appropriations measure to legislate this result and that they were setting aside their rules to do so. Indeed, were these expressions of Congressional intent held to be insufficient in quantity or quality to legislate substantively, we would in candor be forced to admit that legislation in appropriations acts was, as a practical matter, out of the question. Such a determination, regardless of our view of the wisdom of the course chosen by the legislature, is clearly beyond the proper scope of this court.

We hold that the legislative history of the Hyde Amendment is consistent with the cooperative federal-state structure of the Medicaid Act and reveals that the Amendment constituted a substantive policy decision concerning the

public funding of abortions which left the states free to fund more abortions than those for which federal funds were made available by the Amendment, but did not require them to do so. The Medicaid Act, to the extent of its repugnancy with the Hyde Amendment, has therefore been altered by the Amendment. *See United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939).

Our analysis has differed from that of the district court in this case, most importantly, in our conclusion that the Medicaid Act does not mandate that a state provide all medically necessary services as determined by the physician. The result is the same, however, for we determined that the Massachusetts Act violates even our less expansive standard, that the limitation on services be "reasonable", "consistent with the objectives of the Act", and not based "solely . . . [on] the diagnosis, type of illness or condition". 42 U.S.C. § 1396a(a)(17); 42 C.F.R. § 440.230. Furthermore, our decision that the Hyde Amendment was intended as more than a cost-shifting device is consistent with the district court's conclusion on this issue.

The judgment of the district court therefore is affirmed, enjoining implementation of Stat. 1978, ch. 367, § 2, Item 4402-5000, insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment. This result is in accord with the state's request that, should an injunction issue, it be modified to allow operation of Chapter 367 consistent with the requirements of the Medicaid Act. The district court properly did not reach the constitutional arguments raised by the parties, because it had statutory grounds for decision. *Hagans* v. *Levine*, 415 U.S. 528 (1974). We now remand the case for consideration of the constitutional questions that remain open—namely, whether the Hyde Amendment, construed as a substantive alteration of the Medicaid Act and thus requiring the states to

establish plans that provide abortion services in no more than those instances which are specified in the Hyde Amendment, is constitutional.

On remand the district court should also afford the plaintiffs who were dismissed from the *Parent's Aid Society, Inc.* v. *Sharp* actions for lack of standing an opportunity to be heard on the standing issue. Although a court may dismiss an action at its own instance, as apparently happened here, it must first afford the parties an opportunity to oppose the dismissal. *See Literature, Inc.* v. *Quinn*, 482 F.2d 372, 374 (1st Cir. 1973).

It is so ordered.

BOWNES, *Circuit Judge* (dissenting). I respectfully dissent.

While I have no problem with my brethren's analysis as to the requirements that the Medicaid Act imposes on a participating state, I cannot agree that the Hyde Amendment has worked a substantive change in those requirements.

The Hyde Amendment was a rider attached to a general appropriations bill for the fiscal year 1978. In addition to making funds available for the Departments of Labor and Health, Education and Welfare, appropriations were made for such disparate purposes as continuing projects and activities as would be available in the District of Columbia Appropriations Act, the Advisory Neighborhood Commissions and the Disaster Loan Fund of the Small Business Administration. Section 209 of Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1970).

The language of the paragraph in which the rider was inserted is important:

> Such amounts as may be necessary for projects or activities provided for in the Departments of Labor,

and Health, Education, and Welfare, and Related Agencies Appropriations Act, 1978 (H.R. 7555), at a rate of operations, and to the extent and in the manner, provided for in such Act, notwithstanding the provisions of Sec. 106 of this joint resolution: *Provided, That none of the funds provided for in this paragraph* shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced.

Id. (emphasis added).

There is nothing in the language of the proviso suggesting that Congress intended to repeal the Medicaid Act in part. The Hyde Amendment specifically addresses itself to the use of federal funds. The words are clear: "*Provided,* that none of the funds provided for in this paragraph . . . ." The usual rule of statutory construction is to start with the words of the statute; if they are clear, there is no need to go further.

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Ex parte Collett,* 337 U.S. 55, 61 (1949), and cases cited therein. Here it is not ***necessary*** to look beyond the words of the statute. We have undertaken such an analysis only to meet Mr. Justice Powell's suggestion that the "absurd" result reached in this case, post, at 1, is not in accord with congressional intent.

TVA v. *Hill,* 46 U.S.L.W. 4673, 4681 n.29 (June 15, 1978).

Although my brethren recognize that the language of the Hyde Amendment speaks only to the use of federal funds, they feel that an extensive excursion into legislative history is necessary because its plain meaning produces a result at variance with the policy of the legislation as a whole. This is a bootstrap approach to statutory construction; it allows a court to ignore the plain language of a statute and rewrite it by drawing upon its legislative history. While congressional debates and committee reports can be a helpful guide to the intent of an ambiguously worded statute, they should not be used to defeat the clearly expressed statutory language. The majority opinion cites *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543-44 (1939), in support of the doctrine that, when the plain meaning of a statute produces a result "plainly at variance with the policy of the legislation as a whole," it is necessary to delve into legislative history. But there is no "legislation as a whole" to consider here. We have an amendment attached to a general appropriations bill. This, of course, is a prime example of why the courts should be and are extremely reluctant to allow a rider to an appropriations bill to amend an entirely separate and distinct statute by implication. *See* extended discussion in *TVA* v. *Hill, supra,* 46 U.S.L.W. at 4683-85. Our own observation in *Mass. Fin. Serv.* v. *Securities Investor Protection,* 545 F.2d 754, 757-58 (1st Cir. 1976), cited in the majority opinion, is pertinent:

> It is not our province to decide whether Congress would have been wiser to draft the SIPC legislation

so as to include firms like MFS as members, *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, 195-96, 57 S.Ct. 139, 81 L.Ed. 109 (1936), and it is no part of our function to extend a statute's reach beyond its clearly indicated scope. *Guiseppi* v. *Walling*, 144 F.2d 608, 614-15 (2d Cir. 1944) (Frank, J.) *aff'd sub nom. Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945). Rather, "[i]t is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern Ry.*, 343 U.S. 562, 575, 72 S.Ct. 985, 993, 96 L.Ed. 1142 (1952). Congress remains free to amend SIPA should it so choose, but as it now stands that act clearly exempts MFS.

But, even assuming that the legislative history is relevant, I can find nothing in the majority's excellently researched and documented history of the debate on this highly emotionally charged subject that clearly indicates that Congress was doing more than limiting the use of federal funds. There were, as my brethren point out, two separate statements, by Congressman Doran and Edwards, to the effect that only federal funds were involved. The majority concludes, however, that these observations were nullified by those portions of the debate in both the House and Senate that focused on the effect of the amendment on the poor, *i.e.*, by Congressman Stokes, Meyner, Sears and Fraser and Senators Packwood, McGovern, Bayh, Brooke and Javits. But the statements of Congressmen Doran and Edwards were never expressly refuted.

My brethren state that "the record is clear that both houses of Congress were acutely conscious that they were engaging in substantive legislation." If this is so, it is hard to understand the absence of any statement during the course of the lengthy debate that the Hyde Amendment was making a significant change in the Medicaid Act.

Surely, someone in the Congress would have been perceptive enough and forthright enough to realize the full implications of the amendment and say so. It is not as clear to me as it is to my brethren that Congress intended a *pro tanto* amendment of the Medicaid Act. The majority opinion points to the absence from the debate of any discussion of the financial effects on the states of being forced to fund abortions that are determined to be medically necessary as further evidence of an intended substantive change in the Medicaid Act. It may also, of course, indicate that Congress was so emotionally enveloped in this volatile and disruptive subject that it failed to think through the implications of what it was doing. In any event, we cannot construe silence on a subject as a positive expression of congressional intent.[1]

We have here a statute whose plain meaning is clear and whose congressional history can be construed to mean that a number of congressmen felt that, contrary to what the statute said, it would effect a substantial change in the Medicaid Act. If this were merely a matter of balancing the words of the statute against the words of the debate, this would be a close case, but the principle disfavoring repeal by implication and Congress' own procedural rules expressly prohibiting changing existing law via an appropriations bill, apply with particular pertinence here and compel a finding that there was no substantive amendment of the Medicaid Act.

The majority's attempt to distinguish this case from *TVA* v. *Hill*, *supra*, rests on the grounds that full-fledged and lengthy congressional debate is a better gauge of congressional intent than a committee report. As I noted

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[1] The suggestion in the majority opinion that funding by a state alone of medically necessary abortions could cripple a state's attempts to provide other necessary medical services in its plan is not buttressed by any facts or figures in the record or the congressional history.

before, however, the subject matter of the debate is an important factor to consider. It would not be inaccurate to say that the more emotional the subject, the less sure we can be that the words used reflect considered thought rather than expressing deeply ingrained feelings. I cannot, as does the majority, ignore the clear teaching of *TVA* v. *Hill, supra.*[2]

> The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." *Committee for Nuclear Responsibility* v. *Seaborg,* 149 U.S. App. D.C. 380, 382, 463 F.2d 783, 785 (1971) (emphasis added); *Environmental Defense Fund* v. *Froehlke,* 473 F.2d 346, 355 (CA 8, 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act. We recognize that both substantive enactments and appropriations measures are "acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively

[2] *TVA* v. *Hill,* 46 U.S.L.W. 4673 (June 15, 1978), is merely the latest in a long line of cases holding that repeals by implication are not favored. *See, e.g., United States* v. *Continental Tuna Corp.,* 425 U.S. 164, 168-69 (1976); *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 456-57 (1945); *United States* v. *Borden Co.,* 308 U.S. 188, 198-99 (1939); *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936).

> the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI(2), for instance, specifically provides:
>
> > "No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order.*" (Emphasis added.)
>
> See also Standing Rules of the Senate, Rule 16.4. Thus, to sustain petitioner's position, we would be obliged to assume that Congress meant to *pro tanto* repeal § 7 of the Act by means of a procedure expressly prohibited under the rules of Congress.

Id. at 4683.

The majority cites *United States* v. *Dickerson,* 310 U.S. 554 (1940), to buttress its position that in rare cases where congressional intent is clear, an amendment to an appropriations bill may effect a change in existing law. In *Dickerson,* the Congress did amend a reenlistment allowance statute by a provision tacked on to an appropriation for the Rural Electrification Administration. But the language used in the appropriations rider specifically referred to the other statute and explicitly suspended its provisions for the fiscal year in question. *Dickerson* is, therefore, a very narrow exception to the established rule. Here, there is no clear amendment of the Medicaid Act in the appropriation proviso and, at the least, some ambiguity in the congressional history as to what Congress really intended.

I am also troubled by my brethren's treatment of what is to me a clear signal in *Beal* v. *Doe,* 432 U.S. 438., 444-45 (1977):

> Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services.

I read this language as a cautionary instruction to the states that, while they would still be within the parameters of the Medicaid Act if they eliminated unnecessary medical services, they would transgress the statutory scheme by precluding necessary medical services from coverage. Which is precisely the situation we confront.

Another factor militating against the result reached by the majority is Congress' own rules. As pointed out in *TVA* v. *Hill, supra,* both houses of Congress have a rule that expressly prohibits changing existing law by an amendment to an appropriation bill. There is scant mention in the congressional debate of these rules or the fact that both houses intended to flout them.[3] Are we to assume that Congress deliberately evaded and ignored its own procedural rules, or forgot about them, or was entirely ignorant of them? The only logical conclusion that gives due deference to Congress' knowledge and respect for its own procedural requirements is that the Hyde Amendment was limited to the use of federal funds only.

The majority opinion focuses on the congressional debate and finds in it a clear intent to amend the Medicaid Act by allowing the states to limit necessary medical services for abortion to those specifically set forth in the Hyde Amendment.[4] This approach in my opinion distorts the

[3] Senator Magnuson did state that the amendment should not be part of an appropriations bill, but did not advert to the Senate rule. Senator Stennis adverted, somewhat obliquely, to the "obscure rules" of the Senate.

[4] As the majority points out, the requirement that the damage to the mother be limited to physical health, excluding any mental health damage, is directly contrary to the specific provisions of the Medicaid Act that medical services may not be denied "solely because of the diagnosis, type of illness or condition." 42 C.F.R. §449.10(a)(5)(i) (1977) [recently recodified as 42 C.F.R. §440.230, 43 Fed. Reg. No. 190 (Sept. 29, 1978)]. *See also* 42 U.S.C. §1396a(a)(10)(A), (C). Rather than reading this language as a repeal by implication of the Medicaid Act, I would read "physical" as surplusage and strike it, leaving "health" standing alone. This construction would permit both statutes to be read in harmony one with the other. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari,* 417 U.S. 535, 551 (1974).

picture. A complete perspective requires a careful look at all of the factors involved: the words of the statute, the congressional history, the rules of the Congress prohibiting substantive changes in existing law by an amendment to an appropriations bill, and the well established principle against repeal by implication, especially by an amendment to an appropriations bill.

Even if the congressional intent were as clear as the majority finds, I do not think that it should be allowed to ride roughshod over firmly established and, at least up until now, well understood congressional rules and judicial principles of statutory construction. I would hold that the Hyde Amendment is limited, as it clearly says, to the expenditure of federal funds and that the medically necessary requirements of the Medicaid Act still apply to the states. While the result may be "anomalous," that is a matter for Congress, not the courts. To quote again from *TVA* v. *Hill, supra,* at 4684:

> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "commonsense and the public weal." Our Constitution vests such responsibilities in the political Branches.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 78-1324.

PRETERM, INC., ET AL.,
PLAINTIFFS, APPELLANTS.,
v.
MICHAEL S. DUKAKIS, ET AL.,
DEFENDANTS, APPELLEES.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
PLAINTIFFS, APPELLEES.,
v.
ALEXANDER E. SHARP, II, ET AL.,
DEFENDANTS, APPELLANTS.

No. 78-1326.

PARENT'S AID SOCIETY, INC., ET AL.,
PLAINTIFFS, APPELLANTS.,
v.
ALEXANDER SHARP, II.,
DEFENDANT, APPELLEE.

JUDGMENT

[D.C. Mass. Nos. 78-1637 & 1653]

Entered January 15, 1979

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: That part of the judgment of the district court enjoining implementation of Stat. 1978, Ch. 367, Sec 2, Item 4402-5000, in so far as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment, is affirmed;

That part of the judgment of the district court that dismissed the plaintiffs from District Court Case No. 78-1637-C is vacated and the causes are remanded to the district court for further proceedings in accordance with the opinion of the court filed this day.

No costs.

By the Court:
/s/
/s/ Dana H. Gallup
Clerk.

[cc: MS. GERTNER AND MESSRS. ROSENFELD, BALLIRO AND HURLEY.]

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 78-1324.

PRETERM, INC., ET AL.,
PLAINTIFFS, APPELLANTS.,
v.
MICHAEL S. DUKAKIS, ET AL.,
DEFENDANTS, APPELLEES.

No. 78-1325.

PARENT'S AID SOCIETY, INC., ET AL.,
PLAINTIFFS, APPELLEES.,
v.
ALEXANDER E. SHARP, II, ET AL.,
DEFENDANTS, APPELLANTS.

No. 78-1326.

PARENT'S AID SOCIETY, INC., ET AL.,
PLAINTIFFS, APPELLANTS.,
v.
ALEXANDER E. SHARP, II,
DEFENDANT, APPELLEE.

ORDER OF COURT

Entered February 2, 1979

Upon consideration of the petition for rehearing,

It is odered that said petition filed on January 29, 1979 be, and the same hereby is, denied.

By the Court:
Dana H. Gallup, *Clerk.*
By
/s/ FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: MS. GERTNER, AND MESSRS. ROSENFELD, BALLIRO AND HURLEY.]

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

Massachusetts Acts of 1978, Chapter 367 §2, Item 4402-5000

4402-5000 For a medical assistance program; provided, that all federal funds received for the purpose of this item shall be credited to the General Fund, and provided further, that no expenditure or commitment made pursuant to this item or to any agreements authorized by chapter eight hundred of the acts of nineteen hundred and sixty-nine, for the purpose of complying with the provisions of Public Law 89-97, Title XIX, shall be incurred in excess of available funds which have been appropriated therefor; and provided, further, that all judgments, appeals and rate changes for services provided in a prior year but finally determined during the current fiscal year may be paid from this account, subject to the approval of the house and senate committees on ways and means; and provided, further, that an amount not exceeding one hundred twenty million dollars may be expended from this item for expenses incurred in the prior fiscal year; and provided, further that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law enforcement agency within thirty days after said incident $700,000,000

Mass. Gen. Laws ch. 118E §1

There is hereby established, pursuant to and in conformity with the povisions of Title XIX of the Social

Security Act (P.L. 89-97), a program of medical care and assistance for certain residents of the commonwealth.

The benefits of the program shall be available to all persons who are eligible for supplemental security income sions of chapter one hundred and eighteen and to all persons who are eligible for supplemental security income payments on account of age or disability under the provisions of title XVI of the federal Social Security Act or for assistance under the provisions of chapter one hundred and eighteen A. The benefits of the program shall also be available to all others who would be eligible for financial assistance under any of the foregoing provisions but for income or resources, provided they meet the requirements of financial eligibility under the program hereinafter set forth, and to all children under eighteen years of age, and adults eighteen, nineteen and twenty years of age whose income and resources are insufficient to meet the costs of their medical care as determined by the financial eligibility requirements of said program.

Section 209, Pub. L. 95-205; 91 Stat. 1460 (Dec. 9, 1977) ("Hyde Amendment")

Provided, that none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

42 U.S.C. §1396

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education and Welfare, State plans for medical assistance.

42 U.S.C. §1396a(a)

A state plan for medical assistance must —

. . .

(10) provide —

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A) —

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirement of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary —

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

except that (I) the making available of the services described in paragraph (4), (14), or (16) of section 1396d(a) of this title to individuals meeting the age requirements prescribed therein shall not, by reason of this paragraph (10), require the making available of any such services, or the making available of such services of the same amount, duration, and scope, to individuals of any other ages, (II) the making available of supplementary medical insurance benefits under part B of subchapter XVIII of this chapter to individuals eligible therefor (either pursuant to an agreement entered into under section 1395v of this title or by reason of the payment of premiums under such subchapter by the State agency on behalf of such individuals), or provision for meeting part or all of the cost of deductibles, cost sharing, or similar charges under part B of subchapter XVIII of this chapter for individuals

eligible for benefits under such part, shall not, by reason of this paragraph (10), require the making available of any such benefits, or the making available of services of the same amount, duration, and scope, to any other individuals, and (III) the making available of medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in clause (A) to any classification of individuals approved by the Secretary, with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, a State supplementary payment shall not, by reason of this paragraph (10), require the making available of any such assistance, or the making available of such assistance of the same amount, duration, and scope, to any other individuals not described in clause (A);

. . . .

(13) provide —

(A)(i) for the inclusion of some institutional and some noninstitutional care and services, and

(ii) for the inclusion of home health services for any individual who, under the State plan, is entitled to skilled nursing facility services, and

(B) in the case of individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1396d(a) of this title, and

(C) in the case of individuals not included under subparagraph (B) for the inclusion of at least —

(i) the care and services listed in clauses (1) through (5) of section 1396d(a) of this title or

(ii)(I) the care and services listed in any 7 of the clauses numbered (1) through (16) of such section and (II) in the event the care and services provided under the State plan included hospital or skilled nursing facility servies, physicians' services to an individual in a hospital or skilled nursing facility during any period he is receiving hospital services from such hospital or skilled nursing facility services from such facility, and

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, consistent with section 1320a-1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval by the Secretary) included in the plan, except that the reasonable cost of any such services as determined under such methods and standards shall not exceed the amount which would be determined under section 1395x(v) of this title as the reasonable cost of such services for purposes of subchapter XVIII of this chapter; and

(E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary;

. . . .

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of sub-

chapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law;

. . . .

42 U.S.C. §1396d

For purposes of this subchapter—

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services (if provided in or after the third month before the month in which the recipient makes application for assistance) for individuals, and, with respect to physicians' or dentists' services, at the option of the State, to individuals (other than individuals with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title) not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, who are —

(i) under the age of 21.

(ii) relatives specified in section 606(b)(1) of this title with whom a child is living if such child, except for section 606(a)(2) of this title, is (or would, if needy, be) a dependant child under part A of subchapter IV of this chapter,

(iii) 65 years of age or older,

(iv) blind, with respect to States eligible to participate in the State plan program established under subchapter XVI of this chapter,

(v) 18 years of age or older and permanently and totally disabled, with respect to States eligible to participate in the State plan program established under subchapter XVI of this chapter,

(vi) persons essential (as described in the second sentence of this subsection) to individuals receiving aid or assistance under State plans approved under subchapter I, X, XIV, or XVI of this chapter, or

(vii) blind or disabled as defined in section 1382c of this title, with respect to States not eligible to participate in the State plan program established under subchapter XVI of this chapter, but whose income and resources are insufficient to meet all of such cost —

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

(2)(A) outpatient hospital services, and (B) consistent with State law permitting such services, rural health clinic services (as defined in subsection (*l*) of this section) and any other ambulatory services which are offered by a rural health clinic (as defined in subsection (*l*) of this section) and which are otherwise included in the plan;

(3) other laboratory and X-ray services;

(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements

with others) to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies;

(5) physicians' services furnished by a physician (as defined in section 1395x(r)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere;

(6) medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;

(7) home health care services;

(8) private duty nursing services;

(9) clinic services;

(10) dental services;

(11) physical therapy and related services;

(12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select;

(13) other diagnostic, screening, preventive, and rehabilitative services;

(14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;

(15) intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals who are determined, in accordance with section 1396a(a)(31)(A) of this title, to be in neeed of such care;

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; and

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include —

(A) any such payment with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

. . . .

42 C.F.R. 440-230 (1978)

(a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not deny or reduce the amount, duration, or scope of a required service under §§440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on medical necessity or on utilization control procedures.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

Nos. 78-1298, 78-1430

WILLIAM BAIRD, ET AL

Petitioners

v.

ALEXANDER SHARP II

Respondent

PRETERM, INC., ET AL

Petitioners

v.

EDWARD M. KING, ET AL

Respondents

Respondents' Opposition To Certiorari

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Respondents' Brief In Opposition To Certiorari

Question Presented For Review

Whether the Hyde Amendment alters federal Medicaid requirements so as to permit states to limit their funding for abortions to the same extent that Congress has limited federal funding for abortions?

Statement of the Case

The two petitions to which this opposition responds attack on substantially the same grounds a decision of the Court of Appeals for the First Circuit. The Court invalidated Massachusetts restrictions on Medicaid funding for abortions, but to a lesser extent than petitioners had sought. The respondent state officials have not appealed from that part of the circuit Court's judgment invalidating the state restrictions.[1]

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[1] The respondent in No. 78-1298 is no longer Alexander E. Sharp. He has been replaced as Commissioner of Public Welfare by John D. Pratt. The petitioners in No. 78-1430 have replaced all the original defendants (footnote cont.)

These cases arose as a result of the Massachusetts Legislature's enactment, as part of its fiscal year 1979 budget, of a provision limiting the use of state Medicaid funds for abortions to three categories: abortions necessary to prevent the death of the mother, cases of forced rape, or cases involving incest.[2] The first complaint, originally captioned Baird

1 (cont.)

in the caption to their petition with the proper successors in office.

[2] Mass. Stat. 1978, ch. 367, § 2, Item 4402-5000. The abortion language reads as follows:

> provided, further that no funds appropriated under this item shall be expended for the payment of abortons not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law (footnote cont.)

v. Sharp, was filed on July 12, 1978. The second, originally captioned Preterm v. Dukakis, was filed on July 13, 1978. Both cases raised not only a claim of conflict between the state restrictions and Title XIX of the Social Security Act 42 U.S.C. § 1396 et seq (the Medicaid Act) but equal protection and privacy claims as well. However, the district Court and the parties focused on the question of statutory conflict. The issue plaintiffs posed in both actions was whether the state law violated what they asserted was a requirement of Title XIX: that states participating in the Medicaid program reimburse participating providers for expenses incurred in rendering "medically necessary" services to Medicaid recipients.

At hearings held July 14, 1979, to consider plaintiffs' request for a temporary restraining order, and July 19, 1978, to consider preliminary injunctive relief, the state defendants argued in response to the claim of conflict that: (a) Title XIX imposed no require-

2 (cont.)

> enforcement agency within thirty days after said incident.

It was carried over in its 1978 form into FY 1979. P.L. 95-480, § 210, 92 Stat. 156.

ment that a state fund all services deemed by a physician to be "medically necessary"; and (b) if such a requirement did exist, it was modified in the area of abortions by the Hyde Amendment.[3] In the defendants' view the Hyde Amendment constituted a Congressional decision to cut back on the federal government's own obligation under Medicaid and thereby to reduce the states' obligation to the same degree.

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[3] The Hyde Amendment is now a universally accepted label for language originally inserted in the FY 1977 appropriations bill for the Department of Health Education and Welfare, which administers the Medicaid program. As originally enacted in P.L. 94-439, § 209, the Hyde Amendment read as follows:

> None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term.

This language was modified by Congress for FY 1978 to read:

(Footnote cont.)

The district court denied temporary relief, since the abortion funding restrictions were not slated to take effect until August 1, 1978; however, on July 28, 1978, it entered a preliminary injunction based on its conclusion that Title XIX did impose a requirement that states reimburse providers for all "medically necessary" services rendered to Medicaid recipients, including abortions. The Court, however, agreed with the state defendants on the Hyde Amendment issue, and accordingly enjoined implementation of the state statute only to the extent it imposed funding restrictions greater than Congress had specified in the Hyde Amendment.

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3 (cont.)

> [N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physi-

(footnote cont.)

All parties appealed from this determination,[4] and, after obtaining a consolidation of the preliminary injunction with the merits under Fed. R. Civ.P. 65(a)(2), they proceeded with briefing and argued the appeal orally on October 6, 1978.[5]

The decision of the Court of Appeals, released on January 15, 1979, contains two quite separate parts. In its first part, the Court agreed with the state defendants that Title XIX carries within it no requirement

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3 (cont.)

> cal health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

It was carried over in its 1978 form into FY 1979. P.L. 95-480, § 210, 92. Stat. 156.

4 On August 7, 1978, the Court of Appeals granted the Preterm petitioners' motion for an injunction pending appeal. The injunction required the state to provide Medicaid funding for all "medically necessary" abortions.

5 The two cases, Baird and Preterm, were consolidated on appeal for purposes of argument.

that a state provide funding for all services deemed by a recipient's physician to be "medically necessary." Preterm Petition (Pet.) 5a-8a, 26a.[6] However, it did conclude that the limitations imposed by the state law were invalid on a far narrower ground. Observing that the restrictions lacked any justification related to cost savings or maternal health, the court determined that the restrictions were unreasonable and inconsistent with the objectives of the federal statute. Preterm Pet. 10a, 26a.

In the second part of its decision the Court of Appeals, after a lengthy analysis, concurred with the district Court's and state defendants' view of the Hyde Amendment.[7]

The Baird petitioners seek review of both parts of the Court of Appeals' decision. The Preterm petitioners contest only the second part.

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6 The Court of appeals' opinion appears in both the Preterm and Baird petitions for certiorari. In this and in all subsequent references to the opinion, respondents cite only to the Preterm petition for one sake of consistency.

7 Judge Bownes dissented from this part of the decision. Preterm Pet. 27a-35a.

Reasons for Denying the Writ

I. Although the Question of State Abortion Funding Requirements Under Medicaid is An Important One, This Case Constitutes A Poor Candidate for Review Because the Underlying Issue of Title XIX's Meaning is Not Properly Before This Court and the Hyde Amendment question is Currently in an Interlocutory Posture.

The respondents agree with petitioners that the issue left open in Beal v. Doe, 432 U.S. 438 (1977), is an important one. The Court itself stated:

> [S]erious statutory questions might be presented if a Medicaid plan excluded necessary medical treatment from its coverage... Id. at 444-445.

If the current state policy trend toward reimbursement restrictions continues,[8] triggering a lengthy docket of

[8] The restrictions are often imposed as part of a state's yearly budget appropriations bill, as is the case in Massachusetts. Thus, as a formal matter, such measures are temporary in duration and self-termina-
(footnote cont.)

federal and state litigation,[9] this Court's consideration of the recurring legal issues appears inevitable. However, this case offers a poor occasion for review of these issues since it would leave unresolved far more important questions than it would settle.

First, this Court would not reach the overriding question of whether, and to what extent, Title XIX prohibits state abortion reimbursement restrictions, absent the Hyde Amendment. The state defendants have chosen not to appeal that part of the Court of Appeals decision; therefore, were it to grant review, this Court would be foreclosed from confronting the central issue in all the litigation cited by petitioners as

8 (cont.)

ting at the end of each fiscal year. However, it appears that the current inclination is to make insertion of the restrictive appropriations language a perennial event. The temporary nature of restrictions therefore would not render them moot. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973).

[9] See cases collected in Court of Appeals decision, Preterm Pet. 2a-3a, supplemented by Preterm petitions at 11, n.9.

the justification for seeking certiorari.[10]

To be sure, the Baird petitioners attempt to raise this Title XIX issue. They include as one of their questions presented the following:

> Whether or not the Court of Appeals erred in deciding that abortion services which are deemed medically necessary by the woman's attending physician need not be funded under a state's plan. Baird Petition at 2.

That question, if properly presented, would strengthen the position that review is appropriate. However, the Baird petitioners are not the proper party to raise the issue. The Court found in their favor under Title XIX, albeit on the grounds of unreasonableness rather than on the "medically necessary" ground advanced in the Baird complaint. A party who prevails below may not appeal solely because he dislikes the theory upon which the Court relied in granting him relief. See Thompson v. Roberts, 24 How. 233, 240-241 (1860). Review in such circumstances would amount to nothing more than an advisory opinion, since whatever this Court's

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[10] See n. 8, supra.

view of the question whether Title XIX includes a "medically necessary" requirement, the basic conclusion that the state statute was inconsistent with Title XIX would not change. Under these petitions for certiorari the first part of the Court of Appeals decision is beyond review, and, without it, this case constitutes an inadequate vehicle for considering state restrictions on the reimbursement of expenses for Medicaid abortions.

There is a second and independently troublesome barrier in the way of review of the petitions for certiorari. The issue properly raised in both petitions concerns the meaning of Hyde Amendment; however, the Court of Appeals disposition on the Hyde Amendment is interlocutory in nature and renders review in this Court premature.

After determining that the Congress had altered Title XIX Medicaid Act "to the extent of its repugnancy with the Hyde Amendment," the court directed as follows:

> We now remand the case for consideration of the constitutional questions that remain open—namely, whether the Hyde Amendment, construed as a substantive alteration

> of the Medicaid Act and thus requiring the states to establish plans that provide abortion services in no more than those instances which are specified in the Hyde Amendment, is constitutional. Preterm Pet. 26a-27a.

Since neither party had briefed or argued the constitutionality of the Hyde Amendment in the district or circuit Court, the remand order was appropriate. See Singleton v. Wulff, 428 U.S. 106, 119-121 (1976). Similarly, without any treatment of this issue below, the parties could not properly argue it for the first time in this Court. See, e.g., Wood v. Strickland, 420 U.S. 308, 326-327 (1975).

The controversy over the Hyde Amendment is therefore in mid-stream. To avoid piecemeal decision-making with its attendant waste of judicial resources, this Court has adopted a presumption against interlocutory review on writs of certiorari. See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 328 (1967).[11]

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[11] Petitioners would not be prejudiced by denial of their writ at this time. If the lower Courts hold the (footnote cont.)

If the Hyde Amendment is to be the subject of this Court's analysis, such review should occur in a setting which includes all the pertinent issues now outstanding, both statutory and constitutional, and on a concrete record which sharpens the presentation of the issues. See W.E. B. DuBois Clubs v. Clark, 309 U.S. 389, 312 (1967). Such a presentation will only be possible after the process of litigation contemplated by the Court of Appeals in its remand order is completed.[12] Accordingly, this Court should deny review at this time.

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11 (cont.)

Hyde Amendment unconstitutional, petitioners will have no need to pursue further review. Conversely, if the Hyde Amendment is held constitutional, petitioners may seek review of all issues in this Court, those raised in their current application and both those which would become ripe upon a Court of Appeals determination of constitutionality. See Milwaukee & Minn. Railroad Co. v. Soutter, 2 Wall. 510, 521 (1864).

[12] The remand order was not a ministerial formality, nor is it now interposed by respondents for purposes of (footnote cont.)

II. The Decision of the Court of Appeals That the Hyde Amendment Constituted More Than A Device to Shift the Cost of Abortions to the States Was Correct.

A further reason for denying the petitions for certiorari is the careful, thorough and correct analysis of the Court of Appeals on the effect of the Hyde Amendment.

The Hyde Amendment reflects a decision by Congress against the use of taxpayers' dollars for abortions in categories beyond those specified by the Amendment's terms. By contrast, petitioners' argument would simply read the Hyde Amendment as shift-

12 (cont.)
delay. To the contrary, the question of the validity of the Hyde Amendment is a difficult con- stitutional issue; it has absorbed the resources and energies of another lower federal Court for some time. McRae v. Califano, (E.D.N.Y., No. 76-1804). For the early history of this case, see McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976), vacated and remanded for further consideration in light of Maher v. Roe and Beal v. Doe. Califano v. McRae, 433 U.S. 916 (1977). The Preterm petitioners acknowledge that the "constitutionality of the 1978 Hyde Amendment was the subject of an extensive trial in McRae . . . . Preterm Pet. at 9, n.5.

ing the payment for Medicaid abortions from two public purses to one. Whereas, in the past the state and federal governments have split the cost of Medicaid abortions, petitioners see the states as now responsible for 100 percent of all abortions legislated out of the federal component of the Medicaid program by the Hyde Amendment. Not only would such a result be an unprecedented anomaly in a cooperative federal-state benefits program, cf. New York Department of Social Services v. Dublino, 413 U.S. 405 (1973), it flatly contradicts the will of Congress. The Court of Appeals' exhaustive review of Congressional history establishes plainly that the members of Congress, regardless of their position on the policy merits of the Hyde Amendment, recognized as a body the following salient point:

> 1. As an initial matter, the Hyde Amendment, if enacted, would preclude use of federal funds for all abortions outside the narrow, specified categories. On this first point the parties are not in dispute;
> 2. As a matter of federal statutory mandate, Congress believed that the states would be free to fund, or not fund, abortions

excluded by the Hyde Amendment. Preterm Pet. 18a-19a.

3. As a matter of practical expectations, every member of the Congress or Senate whose remarks touched even faintly upon the subject assumed that states would—and could—choose not to finance abortions beyond those permitted by the Hyde Amendment; see generally Court of Appeals opinion, Preterm Pet. 14a-19a.

4. On the few occasions when the attention of the Congress was drawn to the fact that the Hyde Amendment constituted substantive legislation extending beyond the usual limits of appropriations bills, it acknowledged that fact and proceeded to legislate, thereby underscoring the inescapable conclusion that it was making a policy decision on Medicaid abortions, not merely a budget exercise, as petitioners urge. Preterm Pet. 15a-17a.

The petitioners assert a position in opposition to the ineroxable conclusion to be drawn from these four points, but they offer no counter evidence from the legislative record. Instead, they pin their argument on

a single narrow doctrine which they read into this Court's decision in Tennessee Valley Authority v. Hill, 98 S. Ct. 2279 (1978). That case, they urge, imposes an inflexible prohibition on construing appropriations riders to effect changes in substantive statutes. To this argument the Court of Appeals gave the appropriate response:

> [P]laintiffs' assertions . . . require[] us to do violence to the Medicaid Act ...The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to drop the total cost of providing the service upon the states runs directly counter to the basic structure of the program...
>
> [T]he principle that two statutes should if possible be found capable of co-existence does not suggest that we should approach the statute with blinders and reconcile them at all costs... Preterm Pet. 22a-23a.

In so stating the Court followed the teachings of United States v. Dickinson, 310 U.S. 554 (1940), a case

which petitioners have tried unsuccessfully to distinguish. See Preterm Pet. at 17. In Dickerson this Court held as follows:

> Congress could suspend or repeal the authorization contained in [a substantive statute bestowing benefits on individuals] and it could accomplish its purpose by an amendment to an appropriation bill or otherwise. United States v. Dickerson, 310 U.S. 544, 555 (1940).

Because the Court of Appeals correctly applied past decisions of this Court and engaged in a thorough and painstaking review of the legislative record to determine the intent of Congress, its judgment should stand.

CONCLUSION

For the reasons set forth above the Court should deny the petitions for certiorari in Nos. 78-1298 and No. 78-1430.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78- 1298

WILLIAM BAIRD, Et al.,

Petitioners

vs.

ALEXANDER E. SHARP II

Respondent

Petition For A Writ of Certiorari To The
United States Court of Appeals For
The First Circuit

MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

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Counsel for Movant

MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the children unborn and born alive in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of children unborn and born alive.

Counsel will present new evidence, unquestionably unparalleled in the legal history of this nation, not presented by the parties. This new evidence is outlined in the attached brief in support of this motion.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in 1868 and punishable by the death sentence. Obviously, a child whose life was protected by the murder laws in 1868 is a person within the language and meaning of the Fourteenth Amendment. Absent a constitutional amendment, the killings are still murder. Justices who presumed to permit these killings may be subject to the death penalty in very many states.

The counsel also adopts by reference the evidence submitted in the amicus brief by the LEGAL DEFENSE FUND FOR UNBORN CHILDREN. That evidence shows Roe v Wade to be based on false evidence and millions of lives to be unconstitutionally exterminated.

WHEREFORE, the Court is moved to appoint Alan Ernest to be counsel to defend the children unborn and born alive.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penality.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins Bk. 1, ch. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. Rex v Senior, 1 Moody CC 346(1832); Reg. v Trilloe, 174 Eng. Rep. 674(1842); Reg. v West, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of the opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 2 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., Clarke v State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., Commonwealth v. Edelin, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost all are born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 Wharton's Criminal Law and Procedure, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but.. ...the lawmaker has determined to make men know and obey." Holmes, The Common Law 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

APR 14 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78- 1298

WILLIAM BAIRD, Et al.,

Petitioners

vs.

ALEXANDER E. SHARP II

Respondent

Petition For A Writ Of Certiorati To The
United States Court of Appeals For
The First Circuit

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE FOR THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE RESPONDENT

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of unborn children.

The amicus presents legal matter to the Court which is not presented by the parties.

The amicus tenders evidence to show that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would be dispositive of this case.

The amicus also adopts by reference the new evidence presented in the brief in support of the Motion To Appoint Counsel For Children Unborn And Born Alive. That evidence shows many Roe v Wade killings to be murder in the first degree.

WHEREFORE, the Court is moved to grant this motion for leave to file this amicus brief.

Alan Ernest
Counsel for Amicus

BRIEF

For the 31 5¢ time, the Supreme Court is petitioned to overrule Roe v Wade, 410 US 113 (1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated.

Can it be pretended that it is any longer the government of the United States,- any government of Constitution and laws,- wherein a Tribunal holding office for life, and asserting to be the ultimate arbiter, conducts proceedings to condemn millions of victims to death; fabricates evidence to make the exterminations appear legal; refuses to allow its evidence to be cross-examined; refuses to appoint counsel to defend the victims; refuses to allow evidence to be presented on behalf of the victims, even evidence showing that the victims are being unconstitutionally exterminated by false evidence?

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade, 410 US 113(1973) on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, infra pages 2-6.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, infra pages 6-9.

3. It is further alleged that the Roe v Wade killings violate federal criminal statutes. The Supreme Court of the United States is charged with criminal falsehood and criminal extermination. See PART III, infra pages 9-11.

ARGUMENT

PART I

ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113(1973) is based on false evidence and millions of lives have been unconstitutionally exterminated: Roe v Wade must be overruled. An EXHIBIT A, outlined below, has been repeatedly submitted to the Court to prove this charge.

EXHIBIT A was succinctly outlined in counsel's 16th petition to overrule Roe v Wade (Unborn Child Roe v John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

---

Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred

Years of Medicine 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293(1864)(American physician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136('868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment,

"any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II
THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect the Roe v Wade killings are in such manifest conflict with due

process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No.78-427):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [citation omitted]

" The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented.

[For example, in Planned Parenthood of Central Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 481-82(4th ed 1969). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing Roe v Wade to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of Roe v Wade.]

"And no abortion case before the Court appears to have had counsel to especially represent the unborn and defend their constitutional right to life.

[Moreover, the Supreme Court has repeatedly refused

to allow counsel to represent the unborn in its judicial proceedings, and to defend the unborn's constitutionally protected right to life.

In Doe v Bolton, the Attorney General of Georgia requested the Court to allow "representation of a guardian ad litem for that fetal entity and for its right to develop to birth." Petition for Rehearing supra, at 5. But the Court denied the request.

In Beal v Franklin, No. 77-891, the Court heard argument after refusing to allow counsel to represent the unborn and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. 57LEd 2d 1131.

In Anders v Floyd, No. 77-1255, the Supreme Court again refused to allow counsel to defend the unborn and present the evidence, supra PART I.]

"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

PART III
THE CASE AGAINST THE SUPREME COURT

Counsel's 8th (Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77- 1358) and each subsequent petition, specified the federal criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination.

The Supreme Court has not denied the charges, much less attempted to prove the charges to be false:

"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

And failure to deny a charge can be taken as an admission that the charge is true. "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick On Evidence 353(1972). "(T)he Court has consistently recognized that . . . silence in the face of accusation is a relevant fact . . . . . Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 47 L Ed 2d 810,822 (1976). And Socrates cross-examined at his trial over 2000 years ago, "(Y)ou are silent, and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying"? And again,"I may assume that your silence gives consent." Apolpgy in Plato 41,45(Jowett transl. 1942).

CONCLUSION

Can it be pretended that it is any longer the government of the United States,- any government of Constitution and laws? As noted in the 18th petition to overrule Roe v Wade(Gaetano v U.S. Court of Appeals for the District of Columbia Circuit, No. 78-428):

"Through Roe v Wade, the Supreme Court has asserted a second method for the government to condemn persons to death:

"The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right to representation by counsel; with right to be acquitted unless found guilty beyond a reasonable doubt; with provision to stop execution if new evidence is discovered.

"The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims)to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution, falsifying evidence to make the homicides appear legal, and year after year to repeatedly deny applications showing the exterminations to be illegal.

"In 1975, the Supreme Court of West Germany held that the clause in the German Constitution, 'Everybody has the right to life,' also 'includes unborn human beings,' that 'Abortion is an act of homicide,' and the state has a 'duty' under the Constitution 'to protect unborn life.' . . .It was just about 35 years ago that the German judges decided that certain persons were not protected by their law. And it is now of paramount international importance to determine how it is possible for the high courts of two major democratic nations, construing constitutional phrases that are substantially identical, to reach diametrically opposing conclusions about the legality of millions of premeditated homicides.

"That examination, presented in EXHIBIT A, surely permits reasonable people to conclude beyond a reasonable doubt that the Supreme Court closed its eyes on the Constitution and condemned to death millions of victims whom the Constitution endeavors to preserve; and there appears to be no defense that will not amount to a claim that the Supreme Court is above the law- that as Hitler was to Germany, so the Supreme Court is to America.

"If it be true, as Chief Justice Marshall once held(see Marbury v Madison, 1 Cranch 137, 163, 176, 178) that 'government of laws, and not of men,' founded in a 'written constitution' deriving its just power from the 'supreme' 'authority' of 'the people' is 'the greatest improvement on political institutions,' then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of government."

Wherefore, counsel demands opportunity to cross examine the evidence in Roe v Wade, and to present evidence on behalf of the unborn to establish their constitutionally protected right to life and that the Supreme Court obey the evidence.

Alan Ernest
Counsel

see

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